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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 408.

HENRIETTA KREAM,

Petitioner,

v.

PUBLIC SERVICE COORDINATED TRANSPORT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the Supreme Court of New Jersey (App. page 35 of Petition) is reported at 24 N. J. Reports, page 432. The opinion of the Appellate Division of the Superior Court of New Jersey is reported at 42 N. J. Superior Court Reports, 307. The opinion of the Essex County Court of New Jersey is not officially reported but is at page 31a of the Record. The opinion of the Division of Workmen's Compensation is not officially reported but is at page 17a of the Record.

Jurisdiction.

The Petitioner erroneously asserts that jurisdictional requisites exist under the "due process" and "equal protection of the laws" clauses of the Fourteenth Amendment.

Questions Presented.

1. Whether the judgment of the Supreme Court of New Jersey denying workmen's compensation payments to the Petitioner because she had failed to sustain the burden of proving that her decedent's death was by accident arising out of and in the course of his employment was in violation of a Federal right under the "due process" and "equal protection of the laws" clauses of the Fourteenth Amendment.

2. Whether the denial by the Supreme Court of New Jersey of a petition for rehearing raises a substantial Federal question upon the asserted grounds that such denial was a taking of property without due process of law and the denial to the Petitioner of equal protection of law.

Statute Involved.

Section 34:15-7 of the Revised Statutes of New Jersey under which section compensation for the death of an employee by accident arising out of and in the course of his employment shall be made by the employer.

Statement.

This litigation concerns a contention made by the Petitioner that her decedent met his death by accident arising out of and in the course of his employment with the Respondent.

The decedent suffered a fatal heart attack while driving his own automobile on a public street in the City of Newark as he was en route to his home after quitting his employment for the day. His death occurred shortly after noontime. The medical examiner's report of autopsy (Record 255a) gives the primary cause of death as coronary arteriosclerosis, severe, occlusive. The incidents preceding the fatal heart attack are briefly stated in the Supreme Court opinion as follows (24 N. J. 432, 433):

> "Decedent, aged 50, was a bus driver of the respondent and had been in its employ for several years. There is no proof in this case of a prior coronary involvement. On February 2, 1952, he apparently left his home in good health around 9:00 o'clock and reported for work at the garage of the respondent at 20th Street and 16th Avenue, Newark, N. J.; took out his bus and went on his regular run at 9:58 A.M. Later, at 11:35 A.M., he called the dispatcher, Ulbrich, at the garage stating he was at the end of the run at Military Park and requested that he be relieved of duty because 'he had been sweating and he had chills.' The decedent did not ask for medical attention and volunteered no information beyond saying he was having chills and fever and wanted to be relieved at the end of the particular run he was then starting. He specifically asked to be relieved at 14th Avenue and 19th Street which is the regular relief point. When he had driven to work that morn-

ing before reporting to the garage he had parked his own automobile between 19th and 20th Streets on 14th Avenue.

"The dispatcher, at about 11:37 A. M., told the relief driver Wayda, to relieve the decedent as requested. Wayda got his things together and then proceeded to the relief point, a distance of some three blocks, and waited there for the arrival of the bus. He stated he got there about 11:50 and waited about five minutes for the bus which finally came along and that he noticed the decedent, Kream, was sweating which was unusual for that time of year, which was February. He testified 'I told Harry Kream to call up the company and have someone drive his car home', and that Kream answered 'He did not want to be bothered * * * that he would go home himself.' He left the bus and walked across the street to where his car was parked.

"The decedent started to drive home in his own car and had gone several miles when he apparently lost consciousness and his car veered across the street out of control, ran into a hedge and came to a stop against a retaining wall. A direct eye witness, one Bloom, who was experienced in first aid, crawled into the car to give aid and noticed that Kream was bleeding from the mouth and stayed with him until he died, which was about five minutes later and before the police arrived. He fixes the time very definitely as shortly after noontime, because a minute or two before the accident, he was quite startled when the air raid siren went off just as he was passing the siren. * * *"

Doctors Saul Lieb (R. 146a-15) and Michael Ritota (R. 112a-31), witnesses produced by the Petitioner, testified that the driving of the bus contributed to the death. Doctors Jerome Kaufman (R. 231a-20) and Jack York (R.

222a-15) testified that the death was due to natural causes and that the driving of the bus did not contribute to the death.

The Petitioner's Doctor, Michael Ritota, testified (Record 126a-26):

> "I think I can say that the arteriosclerosis here was making progress from a long time back, even during this episode up to the time of death.",

and (Record 112a-2):

> "That any situation between the time that he had the initial chills and sweating until the time of death were an imposition and a load upon the heart. No matter what he did do in that period of time, like walking or driving a bus or any exertional activity was an imposition upon that work load of the heart.",

and (Record 113a-21):

> "* * * I'd even restrict him from extra motion in bed.",

if he were put to bed.

Dr. Saul Lieb, the Petitioner's other doctor, testified (Record 147a-18) that the driving of his own automobile "sure was" inadvisable and (Record 155a-29) that he would "* * * say he had an attack of acute coronary insufficiency in the natural course of the disease."

The Division of Workmen's Compensation awarded the Petitioner compensation where a finding was made that the death was by an accident which arose out of and in the course of the decedent's employment with the Respondent.

On the Respondent's appeal to the Essex County Court of New Jersey the Petitioner's award was affirmed.

On the Respondent's appeal to the Appellate Division of the Superior Court the judgment of the County Court was reversed.

The Supreme Court of New Jersey affirmed the judgment of the Appellate Division upon the ground that the Petitioner had failed to sustain the burden of proving that her decedent's death was by accident arising out of and in the course of his employment.

ARGUMENT.

The New Jersey Supreme Court did not deny the Petitioner equal protection of the laws in deciding that she had failed to sustain the burden of proof that her decedent's death was by accident arising out of and in the course of his employment.

The well-settled rule in New Jersey as applied to heart cases where compensation is sought under the New Jersey Workmen's Compensation Act is that there is a presumption that death from heart disease results from natural causes and that a petitioner has the burden of overcoming that presumption and to establish that the death was the result of an event or happening beyond the mere employment itself which brings about the final result or contributes thereto and without which the injury or death would not have resulted. The evidence must preponderate in favor of the tendered hypothesis. *Lohndorf* v. *Peper Bros. Paint Co.*, 134 N. J. L. 156 (Sup. Ct. 1946), affirmed 135 N. J. L.

352 (E. & A. 1947); *Ames* v. *Sheffield Farms Co., Inc.*, 137 N. J. L. 336 (Sup. Ct. 1948), affirmed 1 N. J. 11 (1948); *Seiken* v. *Todd Dry Dock Inc.*, 2 N. J. 469 (1949); *Grassgreen* v. *Ridgeley Sportswear Mfg. Co.*, 2 N. J. Super. 62 (App. Div. 1949); *Snoden* v. *Borough of Watchung*, 29 N. J. Super. 41 (App. Div. 1953), affirmed by Supreme Court 15 N. J. 376 (1954); and *Mergel* v. *N. J. Conveyors Corp.*, 14 N. J. 609 (1954). Implicit in the application of the above rule is the necessity of establishing by the burden of the proof causal connection between the event in the employment and the injury or death.

That the above rule referable to heart cases was applied by the New Jersey Supreme Court in the case at bar is manifest by the fact that the Court cites the *Mergel* case, *supra*, and summarizes its holding in full accord with the above statement of the rule. The state court in the application of the above rule pointed out in its opinion that:

(24 N. J. at p. 436)

> "In testing whether the petitioner has maintained the burden of proof we have held that the standard as to the quality of the evidence is probability rather than certainty, and if under the evidence the tendered hypotheses become a rational inference based upon the preponderance of probabilities the burden of proof is sustained." *Gilbert* v. *Gilbert Machine Works, Inc.*, 122 N. J. L. 533 (Sup. Ct. 1939); *Green* v. *Simpson & Brown Construction Co.*, 14 N. J. 66, 69 (1953); *Mergel* v. *New Jersey Conveyors Corp.*, *supra*.

(24 N. J. at p. 437)

> "On the proofs before this court any inference that may be drawn would have to be based upon one

of several possibilities. We are left to speculate as to what caused the original attack and when the onset came. No rational inference based upon preponderance of probabilities can be drawn from the medical testimony as to what particular act of the decedent after the onset of the attack could have been a causative factor, if any, in the aggravation thereof. The only probable inference that can be drawn from the medical testimony is that any bit of exertion, either connected with or not connected with the employment, could have been an inducing factor in the fatal result here.

"We cannot speculate as to whether any exertion created by getting out of the seat of the bus at the end of the line, or driving the bus or walking from the bus to the parked car and then driving several miles before the fatal spasm in the attack could have been the inducing factor. There is absolutely no proof in this case that any act related to the employment induced the onset of the original attack of which the original chills and perspiration are but probable symptoms."

The New Jersey Supreme Court upon the record and the application of the above rule to the facts in the record found that the Petitioner had failed to sustain the burden of proof.

Thus a question involving an evaluation of the evidence and a determination of fact was presented to and resolved by the New Jersey Supreme Court. The litigation instituted by the Petitioner was fully heard by the Supreme Court of New Jersey in the regular course of judicial proceedings where the issue to be resolved was whether the Petitioner had sustained the burden of proving that her decedent's death resulted from an accident arising out of and in the

course of his employment. She failed in her action because the state court in evaluating the evidence as to quality concluded that no rational inference based upon preponderance of probabilities could be drawn supporting the hypotheses that the death resulted from an accident arising out of and in the course of the employment.

Whether the Petitioner had met the requirements of the New Jersey Workmen's Compensation Act so as to be entitled to payments thereunder was a question of local law as to which the decision of the New Jersey Supreme Court is binding upon this Court. *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64. The mere fact that the Petitioner was unsuccessful in her litigation does not show that there has been a violation of the "due process" of law or "equal protection of the laws" clauses of the Fourteenth Amendment. A question of fact decided by a state court will not ordinarily be made a subject for consideration by this Court. In *Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389, 394, this Court stated:

> "* * * The rule is settled that the decision of a state court upon a question of fact ordinarily cannot be made the subject of inquiry here. See for example, *Missouri, K. & T. Ry. Co.* v. *Haber*, 169 U. S. 613, 639; *Smiley* v. *Kansas*, 196 U. S. 447, 453-454. To this general rule there are two equally well settled exceptions: '(1) Where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.' *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 593, and cases cited. See also *Truax* v. *Corrigan*, 257 U. S. 312, 324-325. * * *"

In an effort to obtain a review of the evidence by this Court and a finding of fact by this Court the Petitioner charges that the Supreme Court of New Jersey violated her right to due process and equal protection of the laws as guaranteed by the Constitution and that the violation by that Court consisted of a disregard and failure to apply a rule of law laid down in *Cavanaugh* v. *Murphy Varnish Co.*, 130 N. J. L. 107 (Sup. Ct. 1943), affirmed on Supreme Court opinion, 131 N. J. L. 163 (1944); *Ciocca* v. *National Sugar Refining Co.*, 124 N. J. L. 329 (E. & A. 1939); *Mixon* v. *Kalman*, 133 N. J. L. 113 (E. & A. 1945); *Geltman* v. *Reliable Linen and Supply Co.*, 128 N. J. L. 443 (E. & A. 1942); *Schust* v. *Wright Aeronautical Corporation*, 7 N. J. Super. 54 (App. Div. 1950), certification denied by New Jersey Supreme Court, 5 N. J. 177 (1950); and *Cierpial* v. *Ford Motor Company*, 16 N. J. 561 (1954). These cases stand for the proposition that a compensable accident arises out of the employment when the proofs show that the employment is one of the contributing causes without which the accident which actually happened would not have happened. In each of the cases the petitioner prevailed because the burden of proof had been sustained. The holdings in the cases cited by the Petitioner are in complete harmony with the opinion rendered by the New Jersey Supreme Court in the present case. If the Petitioner had produced evidence of the quality that a rational inference based upon preponderance of probabilities could have been drawn supporting the hypotheses that the death resulted from an event or occurrence beyond the mere employment itself, arising out of and in the course of the employment, the Petitioner would have prevailed.

The action of the New Jersey Supreme Court was not arbitrary but a deliberate determination rendered in the regular course of judicial proceedings in complete harmony with the controlling precedent. The decision and judgment meets fully with the requirement of "equal protection of the laws". The principal target at which the Petitioner levels criticism of the state court is the comment made in the opinion that:

> "We cannot speculate as to whether any exertion created by getting out of the seat of the bus at the end of the line, or driving the bus or walking from the bus to the parked car and then driving several miles before the fatal spasm in the attack could have been the inducing factor. * * *"

Upon that comment by the court of the possibilities involved in the case, the Petitioner attempts to raise the violation of a Federal right by charging that there was no evidence in support of the various items contained in the comment and that there was an interjection into the case of a new theory.

The evidence supporting the Court's comment will be found in the Record as follows:

As to getting out of the seat of the bus at the end of the line.

261a, lines 17-25 of the Record:

> "He was seated at t time I approached him and marked in his card. * * * He was finishing off his card that we have as a record in the bus, and then he got up and stepped out of the bus * * *."

As to walking across the street.

283a, lines 35 and 36 of the Record:

> Witness Wayda last saw the decedent "walking across the street to get into his car" which was parked "between 19th Street and 20th on 14th Avenue."

As to distance decedent drove his automobile after being relieved.

149a, line 9 of the Record:

> "I would guess that that distance was also several miles" from 14th Street and 19th Avenue to 478 Hawthorne Avenue where the fatal attack occurred.

As to the decedent's driving the several miles.

> The Petitioner at page 8 of her petition admits that the decedent was driving his own car and Witness Blum at 68a, line 15 of the Record directly testifies that he saw the decedent driving the car, veer off the road and hit a brick retaining wall on the left-hand side of Hawthorne Avenue.

Obviously the comments of the court find support in the evidence.

In relation to the assertion that the decision of the New Jersey Supreme Court rested upon a theory which the Court interjected into the proceedings for the first time, it is patent that the Petitioner overlooks the fact that she is endeavoring to seek benefits under specific legislation wherein statutory prerequisites are spelled out, all of which must be met by a preponderance of the evidence. The observation of the state court is to the effect that the items

referred to could be possibilities for the fatal collapse, but the hypotheses, tendered by the Petitioner, that the bus driving was a cause of the collapse had not been sustained by evidence of a quality that a rational inference based upon preponderance of probabilities could be drawn in support thereof.

The controversy involved in this litigation in each of the judicial proceedings has been whether the Petitioner's decedent met his death by an accident arising out of and in the course of his employment. The Petitoner's duty throughout the entire proceedings was to bear the burden of proof in overcoming the presumption that death was due to natural causes and to establish that the death was the result of an event or happening beyond the mere employment itself, which brought about the final result or contributed thereto and without which the death would not have resulted.

With respect to the statutory requirements, the Petitioner had full opportunity to be heard before the Supreme Court of New Jersey. It apparently is the view of the Petitioner that all evidence relative to other activities engaged in by the decedent should have been ignored by the court even though there is in the record affirmative proof establishing the other activities.

The petition for rehearing made to the Supreme Court of New Jersey was grounded upon the reasons urged by the Petitioner as a basis for the granting of a writ of certiorari by this court. At page 9 of the petition for rehearing addressed to the Supreme Court of New Jersey it appears that the Petitioner urged that the Fourteenth Amendment to the Constitution of the United States was violated by the

State Supreme Court in disregarding and not applying a rule of law laid down in the *Cavanaugh* case and other cases previously set forth, as well as in postulating that other activities of the decedent besides driving his bus could have brought about his death. The grounds stated to the New Jersey Supreme Court attempting to raise charges of the invasion of a Federal right were apparently an afterthought injected into the proceedings. The action of the New Jersey Supreme Court in denying the petition for rehearing was in full recognition of its determination that the Petitioner had failed to sustain the burden of proof and its conclusion "* * * the burden of proof established by the cases must be sustained by the petitioner. In this case it was not." Under such circumstances, particularly where a determination was solemnly arrived at in the regular course of judicial proceedings, the requirements of due process do not put the court under an obligation to grant a rehearing for no other purpose than reconsidering the persuasive qualities of all the testimony in the record.

Conclusion.

It is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

HENRY J. SORENSON,
Counsel for Respondent.

September 11, 1957.